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Supreme Court of the United States

October Term, 1964.

No. 989

ALBERT N. SHAHADI; JOSEPHINE SHAHADI; GUARANTEE BANK AND TRUST COMPANY OF ATLANTIC CITY, NEW JERSEY; COUNTY OF ATLANTIC, NEW JERSEY and FRANK S. FARLEY, Treasurer of the County of Atlantic.

ALBERT N. SHAHADI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

GEORGE P. WALKER,
427 Cooper Street,
Camden 2, New Jersey,
ROBERT M. TAYLOR,
2215 Land Title Building,
Philadelphia 2, Pa.,
Attorneys for Petitioner.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

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PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Albert N. Shahadi, prays your Honorable Court for allowance of a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Third Circuit entered January 8, 1965 affirming the judgments of March 6, 1964 and March 10, 1964 of the United States District Court for the District of New Jersey and in support thereof, submits the following data and argument:

OPINION BELOW.

The opinion of the Court of Appeals for the Third Circuit filed January 8, 1965 is not as yet reported. A copy of same is contained in the appendix hereof at page 2a.

Copies of the District Court's opinion of March 6, 1964 and March 10, 1964 respectively are contained on pages 7a-9a in the petitioner's appendix.

JURISDICTION.

The statutory provision conferring jurisdiction on this honorable Supreme Court of the United States to review said judgment and decision by writ of certiorari is that invoked under Section 1254 of the United States Judiciary Code, 28 U. S. C. A., Section 1254.

QUESTION PRESENTED FOR REVIEW.

I. Did the lower appellate court misinterpret, misconstrue or misapply the proper interpretations to be given Sections 272(a), 273, 275, 276 and 277 as found in the Internal Revenue Code of 1939?

STATEMENT OF THE CASE.

On January 7, 1954, pursuant to the Internal Revenue Code of 1939, Section 273, jeopardy assessments were made by the Commissioner of Internal Revenue against the petitioner, Albert N. Shahadi, for income taxes for the years 1944 through 1949, inclusive. Petitioner filed no bond to stay collection on said jeopardy assessments at any time. On February 11, 1954, the Commissioner mailed statutory notices (a breakdown of the jeopardy assessments). Within the time allotted by statute, the petitioner filed petitions for redeterminations on said jeopardy assessments with the Tax Court (May 10, 1954). The Commissioner during all this time proceeded to collect by distraints and levies on said jeopardy assessments and, as a result of same, did collect a substantial amount of said assessments.

In addition, he liened and levied (but did not sell) stocks owned by the petitioner, which were then and are now held by a bank as collateral for a loan which it had made to petitioner some time ago. At the time the Commissioner liened and levied on said stocks, there was a substantial equity in the stocks above the loan which the bank had made to the petitioner. Neither the Commissioner nor his agents have been able to give any explanation as to why the Commissioner or his agents failed to proceed and sell said stocks and apply the proceeds thereof to the jeopardy assessments as was being done regarding all other assets of the petitioner, including his salary as a County Solicitor of Atlantic County, New Jersey.

The Commissioner, as a result of his constant and continued levies and distraints, did collect approximately $60,000.00. However, because of the fact that he failed to sell the stocks upon which he had already made a levy, there has been inflicted upon the petitioner an additional $42,000.00 in interest. Had the Commissioner sold the stocks under the levy, there would practically be no tax due, if any, a nominal amount.

On June 2, 1961, the Commissioner filed his complaint in the instant case and asked for a money judgment on the balances of said jeopardy assessments. In his complaint, he failed to set up any exception or reason for the suit having been brought more than six years after the date of the jeopardy assessments, and no amendment to his complaint was made at any time either during the arguments or the trial below.

A motion for summary judgment was made by the plaintiff and a cross-motion for summary judgment was made by the petitioner, together with an oral motion to dismiss the action of the plaintiff because of its failure to plead an exception to the running of the statute of limitations. Judgment was entered for the plaintiff.

During the course of the oral argument before the lower appellate court, counsel for the Commissioner was con-

stantly asked whether he could give any reason as to why the petitioner's stocks had not been sold. He could not give any reason. Although the lower appellate court kept constantly questioning this tremendous increase of interest and the fact that same was caused by the Commissioner sitting on his hands as it were, the Commissioner through his counsel could give no reason for its omission in not proceeding to an immediate sale of said petitioner's stocks.

REASONS FOR ALLOWANCE OF THE WRIT.

We believe the question involved herein is one of great importance and will have importance far beyond the particular facts and parties involved herein, and it is therefore vital that the question should be decided finally by this honorable Supreme Court. The statute of limitations as applied to the 1939 Revenue Code and the 1954 Code has had conflicting interpretations applied by the various circuit courts. In most of the instances, the circuit courts have adopted a position of treating the sovereign as one distinct and separate from the average citizen appearing in those courts. This we say runs contrary to the general principles as established in law and equity. There has as yet, in our opinion, not been set forth, a decent and legal logical yardstick for measuring the proper application of the statute of limitations and jeopardy assessments in taxing matters. There should not be a sovereign distinction as in our opinion is clearly demonstrated by the various decisions forthcoming from the circuit courts and as is clearly demonstrated in the instant case. We feel that this case should once and for all decide that the Commissioner of Internal Revenue with respect to a taxpayer is no different than the situation which surrounds the atmosphere concerning any creditor and debtor and the general principles of law and equity that apply to creditor and debtor situations should

be adhered to regardless of who the creditor or debtor is. We further feel that when the Courts are called upon to interpret a fair meaning of a statute, they are bound to take into deep consideration any resultant injustice which might occur as a result of said interpretation and said Courts should not rule as in this case, that regardless of the injustice done to a party, they must take a position of pure protection of the sovereign's revenue.

The instant case reflects an admission by the lower appellate court that an injustice was done by an omission on the part of the creditor in increasing to a tremendous amount an interest accumulation, but they take the position that they are without judicial power to rectify this situation because they might, as they say, have to declare a certain portion of the statute a nullity. This runs counter to the general rules of interpretation and is brought about only because the so called creditor happens to be the sovereign. We feel that under all these circumstances a clear and definitive measuring rod should be set up by this honorable Court for conditions such as these, to take effect in preventing injustices, which no court hesitates to do in ordinary circumstances involving creditors and debtors. We also set forth the fact that this certiorari should be allowed because there is a conflict existing between the third circuit and the second circuit in that the second circuit in the case of *United States v. O'Connor*, 291 F. 2d 520, did hold in its findings of fact, in a case similar on all points and facts to the one at hand, that the statute of limitations applies to a jeopardy assessment even though there was pending a petition in the Tax Court requesting a redetermination and said petition for redetermination did suspend the running of the statute as in other cases. We quote from the above case as follows:

> "On September 12, 1951, the Commissioner made jeopardy assessments against Raymond O'Connor and his wife Bertha for deficiencies in income taxes under 273(a), Int. Rev. Code of 1939. Thereafter taxpayers

filed a petition in the Tax Court requesting a redetermination. No bond to stay collection of the tax was filed. The Commissioner answered and taxpayers replied.

"On August 23, 1957, just before the six-year statute of limitations would have run on the O'Connor assessments, the Government brought this action under 7403." (Emphasis added.)

We submit that the above cited case in which Judge Friendly made the quoted finding of fact was not probably on a point argued, but none the less, all of the judges did agree as to the finding of fact as quoted and it did appear that it was clear to them that the jeopardy assessment under those circumstances ran out after six years.

ARGUMENT.

It is apparent that the most important and probably the sole issue of argument in this case is the interpretation that is to be given to Section 277 of the 1939 Code and its applicability to the present facts.

Petitioner herein submits pertinent excerpts of the statutes involved from which argument will be made concerning the history of Section 277 of the 1939 Code.

Section 276, Subparagraph (c) of the Internal Revenue Code of 1939 provides as follows:

"(c) Collection after assessment.

Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in Court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commis-

sioner and the taxpayer before the expiration of such six year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Section 273 of the Internal Revenue Code of 1939 provides as follows:

"Jeopardy Assessments.

(a) Authority for making. If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) Deficiency letters. If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under Section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

(f) Bond to Stay Collection.

When a jeopardy assessment has been made the taxpayer, within 10 days after notice and demand from the collector for the payment of the amount of the assessment may obtain a stay of collection of the whole or any part of the amount of the assessment by filing with the collector a bond in such amount, not exceeding double the amount as to which the stay is desired, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount, the collection of which is stayed by the bond, as is not abated by a decision of the Board which has become final, together with interest thereon as pro-

vided in Section 297. If any portion of the jeopardy assessment is abated by the Commissioner before the decision of the Board is rendered, the bond shall, at the request of the taxpayer, be proportionately reduced.

(g) Same further conditions.

If the bond is given before the taxpayer has filed his petition with the Board under Section 272(a), the bond shall contain a further condition that if a petition is not filed within the period provided in such subsection, then the amount, the collection of which is stayed by the bond will be paid on notice and demand at any time after the expiration of such period, together with the interest thereon at the rate of 6 per centum per annum from the date of the jeopardy notice and demand to the date of notice and demand under this subsection.

(h) Waiver of stay.

Upon the filing of the bond the collection of so much of the amount assessed as is covered by the bond shall be stayed. The taxpayer shall have the right to waive such stay at any time in respect of the whole or any part of the amount covered by the bond, and if as a result of such waiver any part of the amount covered by the bond is paid, then the bond shall, at the request of the taxpayer, be proportionately reduced. If the Board determines that the amount assessed is greater than the amount which should have been assessed, then when the decision of the Board is rendered the bond shall, at the request of the taxpayer, be proportionately reduced."

Section 272 of the Internal Revenue Code of 1939 provides as follows:

"(a) (1) Petition to Board of Tax Appeals.

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect to the tax imposed by this chapter, the Commissioner is au-

thorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in a proper court . . ."

"(2) Cross References.

For exceptions to the restrictions imposed by this subsection, see subsection (d) of this section, relating to waivers by the taxpayer; subsection (f) of this section relating to notifications of mathematical errors appearing on the face of the return; *Section 273, relating to jeopardy assessments;* Section 274, relating to bankruptcy and receiverships; and Section 1145, relating to assessment or collection of the amount of the deficiency determined by the Board pending Court review.

"(c) Failure to file petition.

If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

"(d) Waiver of Restrictions.

The taxpayer shall at any time have the right, by a

signed notice in writing filed with the Commissioner, waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

"(f) Further deficiency letters restricted.

If the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subsection (a) of this section, and the taxpayer files a petition with the Board within the time prescribed in such subsection, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subsection (e) of this section, relating to assertion of greater deficiencies before the Board, or in Section 273(c), relating to the making of jeopardy assessments. If the taxpayer is notified that, on account of mathematical error, such notice shall not be considered (for the purposes of this subsection, or of subsection (a) of this section, prohibiting assessment and collection until notice of deficiency has been mailed, or of section 322(c) prohibiting credits or refunds after petition to the Board of Tax Appeals) as a notice of a deficiency, and the taxpayer shall have no right to file a petition with the Board based on such notice, nor shall such assessment or collection be prohibited by the provisions of subsection (a) of this section."

Section 277 of the Internal Revenue Code of 1939 provides as follows:

"Suspension of running of statute.

The running of the statute of limitations provided in Section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under Section 272(a)) be suspended for the period during which the Commissioner is pro-

hibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board until the decision of the Board becomes final), and for sixty days thereafter."

Section 1145 of the Internal Revenue Code of 1939 provides as follows:

"Bond to Stay Assessment and Collection.

Notwithstanding any provision of law imposing restrictions on the assessment and collection of deficiencies, the review under Section 1142 shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Tax Court unless a petition for review in respect of such portion is duly filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed has filed with the Tax Court a bond in a sum fixed by the Tax Court not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Tax Court, conditioned upon the payment of the deficiency as finally determined, together with any interest, additional amounts, or additions to the tax provided by law, or (2) has filed a jeopardy bond under the income or estates tax laws. If as a result of a waiver of the restrictions on the assessment and collection of a deficiency any part of the amount determined by the Tax Court is paid after the filing of the review bond, such bond shall, at the request of the taxpayer, be proportionately reduced."

The petitioner herein contends that jeopardy assessments were made by the Commissioner for all the years involved, and said Commissioner did send notices of same to the petitioner informing him that he made said assessments under authority of Section 273 of the 1939 Code. Section 273 of

the 1939 Code is *an exception to the making of an assessment as stated under Section* 272(a). The exception is clearly spelled out in Section 272(a)(2). This is a most important provision as it appears in the aforementioned Section 272(a)(2) because it clearly excepts any and all jeopardy assessments from the provisions of the making of an assessment on a deficiency, as is more fully stated in Section 272(a). It is then clear that Congress, by the very wording of the exception, never intended a jeopardy assessment to be included in the suspension as stated in Section 277. Without a doubt, under the sections of the Code as above discussed, the Commissioner was not prohibited from collecting on the jeopardy assessments even though the case concerning said assessment was docketed with the Tax Court. In fact, the Commissioner, under his jeopardy assessments, could not be restrained, prohibited, or prevented in any manner from collecting on the assessment or from bringing an action in the proper district court for judgment on same; this, despite the fact that the matter was already in the Tax Court. The only time, as set forth in the Code, that the Commissioner can be prevented from proceeding on the jeopardy assessment is when the taxpayer puts up a bond in double amount of the assessment. his specific purpose being to stay collection. In such a case, it is interesting to note that the Commissioner has a double advantage; first, he has actual cash in the form of the bond; second, he would have a contract for payment and a new period for collection on the contract which would run from the day of default.

Despite the allegations and arguments of the petitioner as above, the lower court took the position as set forth by the respondent, namely that Section 277 applies, more specifically, the parenthetical portion of Section 277 [and in any event * * *] and makes no distinction between a jeopardy assessment and a deficiency notice as such.

It is the petitioner's contention that there is no reported decision which can be termed as authority upon the prob-

lem involved herein. All the cases as cited by the respondent in his brief below, in the opinion of the petitioner, were not dispositive of the present question. Said cases were different in facts in that they concerned waivers, assessments and not collections, and the particular problem herein was not advanced so that serious consideration could be given same and in many instances, it was not touched upon at all. In the two or three cases which apparently dealt with the question on hand, the lower court (Tax Court) merely leaned over backwards and gave an "Alice in Wonderland" approach to the interpretation of the words [in any event * * *]. Petitioner will discuss the cases in detail later on.

Section 277, without a doubt, creates an exception to the running of the statute of limitations as set forth in Section 276. It suspends the running of the statute of limitations during the time the Commissioner's hands are tied or prohibited from collecting.

The parenthetical portion upon which the respondent rests his case treats solely with the docketing of a case in the Tax Court. It was put there for one purpose only—to protect the Commissioner as to the running out of his time for the making of an assessment (not collection). The legislative history, which will be discussed later on, clearly shows the purpose as outlined herein. Assuming arguendo at this point that this is so, it would be correct then to say that the Commissioner would have no stake in this part of the section when his problem is one of collecting, not of assessing. In this instant case, the appellant has never challenged the assessment. His contention is that the period for collecting has run out. To read the parenthetical portion otherwise would produce a ludicrous result, for anyone versed in tax laws knows that you can only get to the Tax Court for redetermination if there is no assessment and the redetermination is only on a deficiency which is a *proposed* assessment. The only exception to this proviso insofar as the Tax Court is concerned is a jeopardy assessment which is made,

as in this case, prior to there ever having been a deficiency created. How could the Commissioner be ever concerned with the running out of time on a jeopardy assessment? He can always proceed for collection on the jeopardy regardless of the Tax Court and in fact, he can always start suit to reduce to judgment the jeopardy assessment. The only manner in which the taxpayer can stay or tie his hands would be, as said before, to put up a bond in double the amount.

Further, it is quite evident that the Commissioner as to a jeopardy assessment, even though review of same is being had in the Tax Court, can start proceedings to reduce said jeopardy assessment to a judgment in the proper district court or he can distrain for collection. It is interesting to note further that even if a district court were to issue an injunction against the Commissioner from proceeding on a jeopardy assessment, he can still proceed to file a complaint to reduce same to a judgment if he feels that the statute is about to run out. We respectfully submit that all of the above would clearly show that the Commissioner could have no stake in the parenthetical section of 277(b) with respect to collection. His only stake in same is a protection for assessing. A legal interpretation of this parenthetical section must clearly show that, in effect, this parenthetical section with respect to the Tax Court actually extends the statute of limitations by adding sixty days; and with relation to suspension of the statute, one would have to go back outside of the parenthetical section to the regular wording of Section 277, namely, when the Commissioner is prohibited from proceeding, etc., etc. (hands tied).

The respondent would have you understand that [in any event * * *] means not only a deficiency that is docketed but also a jeopardy assessment—this, despite the fact that the reason for the insertion in the section was made clear by the legislative history covering same. As was said above, Congress could not mean what the respondent contends because the language used does nothing for the Com-

missioner that he cannot already do and has done. In view of the above, the petitioner contends that the entire Section 277 must be ruled in favor of the taxpayer.

To completely understand the meaning of Section 277 of the Internal Revenue Code of 1939, and particularly to its wording (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for sixty days thereafter, it is necessary to trace the legislative history of the addition of this provision in Section 277.

Mertens Law of Income Taxation (Vol. 10, Par. 57.73), 1st Ed., gives the following background of this section, to wit:

> "The Internal Revenue Code, the 1938, 1936, 1934, 1932 and 1928 Acts provide, 'the running of the statute of limitations provided in Section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in Court for collection, in respect of any deficiency, shall (after the notice of a mailing of a notice under section 272 (a)) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in Court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for sixty days thereafter."

There are three periods of suspension provided for in the 1928, 1932 and 1934 Acts for income taxes for 1928 and subsequent years: (a) during the period of prohibition and in any event (b) until the decision of the Board becomes final, where an appeal is filed, and (c) in either case (a) or (b) for 60 days after the end of the suspension period so provided. Where no appeal is filed the period is therefore extended 120 days under the 1932, 1928 Acts and 150 days under the Internal Revenue Code, the 1938, 1936 and 1934 Acts from the date of mailing the deficiency notice.

The 1928 Act amended the 1926 Act, making it read the same as the 1928 Act, except for paragraph references. This amendment affected only cases in which the period of limitations had not expired prior to the enactment of the 1928 Act.

The 1926 Act, as originally enacted, provided:

> "(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in Court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in Court, and for 60 days thereafter."

Provision was also made in the 1926 Act for adding to the period of suspension in the case of taxes imposed by prior acts, the time during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in Court prior to the enactment of the 1926 Act. It was provided:

> "In the case of any income, war-profits, or excess profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in Court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision (b) of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in Court."

The 1924 Act provided:

> "The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeal, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board."

Acts prior to the 1924 Act contained no provision extending or suspending the statute of limitations other than those with respect to waivers or consents.

The sections above quoted indicate a legislative attempt to correct in later Acts defects in the earlier legislation.

It will be noted that the 1924 Act provided simply, when a deficiency notice was sent and no appeal was filed for an extension of 60 days from the date when the assessment against the taxpayer would have been required if no deficiency notice had been mailed, or if an appeal were filed, an extension equal to the number of days between the date of the mailing of the 60 day notice and the date of the final decision by the Board. These provisions of the 1924 Act were subject to several objections. The Commissioner was required, if an appeal were filed, to assess the tax before the expiration of time after the final decision of the Board equal to the period of time between the sending of the 60-day letter and the expiration of the normal statutory period of limitations. Another objection was that an extension of time in excess of 60 days was provided for only in the event that "an appeal has been filed." "In the case of an invalid or ineffectual appeal the extension provided for was non-operative because there was no appeal." Frequently the invalidity of the appeal was not discovered until after the normal period of limitations had run.

The 1926 Act partly remedied these defects. It provided for the "suspension of the statute", as distinguished from

the "extension of the statute", for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in Court and for 60 days thereafter. This provision gave the Commissioner two extensions—one equal to the period in which he was "prohibited" from acting and a further extension at the end of such extended period of an additional 60 days. This covered one of the defects in the 1924 Act noted above.

The suspension of the statutory period when an appeal was taken to the Board was still a matter of doubt, since the Commissioner was by other sections of the Act prohibited from assessing "if a petition has been filed with the Board." It was extremely doubtful whether the statute was suspended in the event an improper or ineffective petition were filed.

The important change made by the 1928 Act was the provision (contained in the parentheses) that the statute should be suspended "in any event, if a proceeding in respect to the deficiency is placed on the docket of the Board, until the decision of the Board becomes final." *These provisions were designed to avoid a technical defect of collection by a dismissal of the petition after the expiration of the ordinary statutory period.*

As previously indicated, this provision was applied retroactively to the 1926 Act, where the period of limitation had not expired prior to the enactment of the 1928 Act. Of course, in computing the limitation period where there was no effective appeal or petition, no time is added for the period during which the "appeal" was docketed with the Board, except, however, that where the limitation period has not expired (disregarding any such extension) at the time of the 1928 Act, the statute will be suspended for the entire period, both before and after the enactment of the 1928 Act, during which the appeal was docketed.

The result of these changes in the 1928 Act is that the Commissioner is not forced at his own risk to determine the validity of petitions and appeals. The "appeal" must,

however, have been made by the taxpayer. The statute is not extended by an "appeal" filed by a non-interested party or an interloper.

Mertens further states, page 242, fo note 87:

> "The basis for such dismissal might be that the petition was not filed within the 60-day period, or because the paper filed was not sufficient to constitute a petition, or because the required bond was not filed with the petition for review, or because a waiver filed by the taxpayer was found to be invalid. In Ways and Means Committee Report No. 2, 70th Cong., 1st Sess. p. 23, it is said in explanation of this provision: 'Under existing law and under the provisions of the bill, the running of the limitation period on assessments is suspended while an appeal is pending before the Board, subsequently the Board may dismiss the appeal on the ground that the petition was not filed within the 60-day period, or for example, because the paper filed within the period was not sufficient to constitute a petition. The decision dismissing the appeal may not be made until months after the proceeding was begun and there is some question whether in such cases the statute of limitations on assessment is actually suspended during the pendency of the proceeding. It is specifically provided in section 277 that the limitation period shall be suspended, if any proceeding is placed on the docket of the Board, until the decision of the Board in respect thereof becomes final and for 60 days thereafter.
>
> "This provision also takes care of any uncertainty as to the suspension of the statute where, after the decision of the Board, a petition for review is filed without the required bond. It also provides for the situation where a taxpayer files a waiver of the restrictions on the Commissioner as to assessment or collection where the legal sufficiency of the waiver may not be determined for a considerable period of time after it is filed.
>
> "It seems obvious that the enforcement of a decision

of the Board which has become final should not be thwarted, and that the decision of the above matters should not be forced into injunction proceedings. Accordingly, in all the foregoing cases the limitation on assessment is definitely suspended by section 277 until the decision of the Board has become final and for 60 days thereafter.

"There is a similar provision in Section 311(d) with respect to the period of limitation on assessment of the liability of a transferee or fiduciary.

"It was suggested to the Committee that language be inserted to show that the running of the statute should be suspended not only when the Commissioner is under the prohibition of Section 272(a) but also when he is restricted by order of Court from making assessment or collection. The Committee feels the language of the present statute is perfectly definite on this point and no clarification is necessary. The statement of the conferees in connection with amendment No. 83 to the Revenue Act of 1926 was specific on the point and *clearly indicated that the intention was to suspend the running of the statute for the period during which, for any reason at all, the Commissioner's hands were tied.* See to the same effect Finance Committee Report No. 960, 70th Cong., 1st Sess., p. 31." (Emphasis supplied.)

A studied reading of the Congressional background and reasoning for the additional wording in the section can only lead to one conclusion and that is, the phrase (and in any event, if a proceeding in respect to the deficiency is placed on the docket of the Board until the decision of the Board becomes final) refers only to procedural operation and does not have the broad meaning that the statute of limitations is suspended whether the Commissioner's hands are or are not tied as to collection where a jeopardy assessment is involved and no bond to stay collection has been filed.

That it referred only to cases where the Commissioner was prohibited from assessing and not to cases where there were jeopardy assessments involved.

As Section 277 refers to 272(a) it is well to study and dissect that section. As shown in the 1939 Internal Revenue Code this section 272(a) is divided into parts (1) and (2), and part (2) refers to cross references which indicates that there are five exceptions to the restrictions imposed by this subsection which exception, No. 3, includes section 273, relating to jeopardy assessments. It is interesting to note that these exceptions referred in section 272(a)(2) are the same exceptions contained in section 274(a) of the Revenue Act of 1926, and subsequent acts.

Referring again to *Mertens Law of Federal Income Taxation,* Vol. 10, 1st Edition, page 91—, it states, "The restrictions imposed by the Code upon the assessment and collection of the tax by the Commissioner do not apply to 'jeopardy assessments'." A jeopardy assessment is a means whereby the Commissioner may assure the collection of the tax in cases which he believes that the use of the usual methods of assessment and collection, with their consequent delay, may result in the failure of ultimate collection. Section 273 therefore gives the Commissioner the immediate right to assess and collect without hindrance.

Mertens further states on pages 92 and 93, "If a jeopardy assessment is made before a notice of deficiency (i.e., 90-day letter) has been sent in respect to the tax to which the jeopardy assessment relates, the Commissioner is required to mail a notice of deficiency within sixty days after the making of the assessment." This notice is in every respect like an ordinary notice of deficiency and the taxpayer may appeal to the Board within 90 days after it is mailed, for a redetermination of the tax. If the Commissioner fails to send the notice by registered mail within the 60-day period, the assessment is nullified and the tax cannot be collected.

In the case of *United States v. Barber,* 24 F. Supp. 229, the Government reiterates all of the above history as it

pertains to Section 277. See footnotes therein. Plaintiff below has cited cases which apparently, at first blush, are dispositive of the problems at hand, such as *Bartmer Automatic Self Service Laundry, Inc. v. Commissioner,* 35 T. C. 317; *Iacone, Estate of v. Commissioner,* decided April 13, 1961 (Tax Court); *Mutual Lumber Co. v. Poe,* 66 F. 2d 904; *United States v. Covel,* decided April 4, 1961; *United States v. Shepard's Estate,* 196 F. Supp. 281.

As to the *Bartmer* case, it is not dispositive either as to the facts or the law. There is no discussion or reasoning of the exception re a jeopardy assessment. The Honorable Judge therein takes for granted the meaning of the words of Section 277 and does not read same in connection with the entire section. The case concerns a transferee liability and the exception, as the petitioner discusses in this matter, was never even raised by the parties therein. As to the *Iacone* case, here again the learned Tax Court Judge made an "Alice in Wonderland" approach and declared the words [in any event * * *] taken by themselves as being clear and meaning just what she wanted them to mean without even a discussion respecting the exception of a jeopardy assessment. It would appear that in all of the other cases, the learned judges completely overlooked proper statutory interpretation and the significant Congressional intent involved. In each case, it is apparent that the words [in any event * * *] were given judicial blessing without a thought to the exception in the jeopardy assessment.

In above cited cases, each of the Judges gave a literal interpretation to the words "in any event" and declared same to be clear despite any comparisons with the rest of the statute. All of said Judges were silent as to the voice of Congress as set forth in the legislative history pertaining to Section 277. We respectfully submit that their interpretation was erroneous and should have been as was so ably stated by Judge Learned Hand in the case of *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.,* 2 Cir., 274 Fed. 2d 487-489:

"It is commonplace that literal interpretation of the words of a statute is not always a safe guide to its meaning. Indeed, in extreme situations this doctrine has been carried so far that language inescapably covering the situation has been disregarded when it defeats the manifest purpose of the statute as a whole."

Holy Trinity Church v. U. S., 143 U. S. 457;
Markham v. Cabell, 326 U. S. 404.

"The legislative intent is to be determined not by taking the word or clause involved in a taxing statute from its setting and viewing it apart, but by considering it in connection with the context, the general purpose of the statute, the occasion and circumstances of its use and other appropriate tests for ascertaining legislative will."

Emery v. Commissioner, 166 F. 2d 27, 1 A. L. R. 2d 409.

It is interesting to note that the lower circuit court in making its interpretation of Section 277, takes a parenthetical part of a total section and in effect says that the parenthetical part restricts and practically overrules the entire meaning of the whole section. We respectfully submit that this is having the tail wag the dog and we further submit that had Congress intended this to be so, they could and would have created a total new section. It is apparent that the lower circuit court refuses the persuasion as set forth by the brief of the petitioner on the ground that if they accepted same, they would have to declare the parenthetical section of 277 a nullity and this they refuse to do. We respectfully submit that this is not so. The lower circuit court could just as well and should have found the parenthetical section as one which is not a restriction upon the total section, but rather an additional explanation with regard to the suspension of the statute in the making of an assessment particularly with regard to a situation involving the nullity of a petition which would have been filed

in the Tax Court. The lower circuit court refers to a Congressional Committee Report as being most helpful in arriving at its decision (Congress House Report No. 2, 70th Cong., 1st Sess., 23-24 (1939-1 Cum. Bull. (Part 2) 384, 399-400)) and upon a close reading of said so-called helpful Committee Report, we see clearly that the argument as set forth throughout by the petitioner with respect to the distinction between assessment and collection under 277 is clearly brought out by said Committee Report. We quote from said Report as set forth in the opinion of the lower circuit court:

> "Under existing law and under the provisions of the bill, the running of the limitation period on *assessments* is suspended while an appeal is pending before the Board. Subsequently the Board may dismiss the appeal on the ground that the petition was not filed within the 60-day period or, for example, because the paper filed within the period was not sufficient to constitute a petition. The decision dismissing the appeal may not be made until months after the proceeding was begun and there is some question whether in such cases the statute of limitations on assessment is actually suspended during the pendency of the proceeding. It is specifically provided in section 277 that the limitation period shall be suspended, if any proceeding is placed on the docket of the Board, until the decision of the Board in respect thereof becomes final and for 60 days thereafter."

We respectfully submit that the lower Circuit Court of Appeals fell into error in believing that a fair interpretation of this Committee Report in any way gives meaning to the words in any event as meaning under any circumstances. We further respectfully submit that the words in any event under Section 277 should not be given the broad scope as declared by the lower circuit court, where to do so would fly in the face of traditional American notions of fair play. We say to subject a taxpayer to additional interest

running into as high as 80 or 90%, caused by the creditor sitting on its hands, and in addition, its omission to act by virtue of its power of levy and lien, prevent the taxpayer from use of its own money or property so that he could do something with regard to defeating the tremendous increases of additional tax caused by said omission on the part of the respondent, is a breach of fair play. *Bowers v. New York and A. Lighterage Co.*, 71 U. S. Supreme Court Reports, page 676; *Old Colony R. R. Co. v. Com.*, 284 U. S. 552; *United States v. American Trucking Association*, 310 U. S. 534-543, "Sections of a statute should not be interpreted literally if the result would be plainly at variance with the legislative intent as a whole."

We respectfully submit that all of the cases as cited by the lower circuit court are not dispositive and are clearly distinguishable by the present facts. We will not burden this court with the distinctions involved, because we feel that the present issue is of sufficient importance and has for the first time been clearly set forth, for a clarification as requested, in this case.

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons and in the interest and pursuit of equity and justice, the petition of Writ of Certiorari should be granted by this Honorable Court. It is certified that this petition is not filed for delay.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

GEORGE P. WALKER,
427 Cooper Street,
Camden 2, New Jersey,
ROBERT M. TAYLOR,
2215 Land Title Building,
Philadelphia 2, Pa.,
Attorneys for Petitioner.

Appendix

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 14873.

UNITED STATES OF AMERICA

v.

ALBERT N. SHAHADI; JOSEPHINE SHAHADI; GUARANTEE BANK AND TRUST COMPANY OF ATLANTIC CITY, NEW JERSEY; COUNTY OF ATLANTIC, NEW JERSEY and FRANK S. FARLEY, Treasurer of the County of Atlantic.

ALBERT N. SHAHADI,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued November 19, 1964.

Before: STALEY, GANEY and FREEDMAN,
Circuit Judges.

OPINION OF THE COURT.

(Filed January 8, 1965.)

By STALEY, Circuit Judge.

This appeal requires us to decide whether under the Internal Revenue Code of 1939 the six-year statute of limitations on suits for collection based on jeopardy assessments is tolled while the determination of liability underlying the assessment is under consideration in the Tax Court. The district court found that the statute was suspended and that the proceeding for collection before it on complaint by the United States was therefore timely. The correctness of that decision is the only question before us on this appeal.

The operative facts were stipulated in the district court and can be summarized as follows. Jeopardy assessments, based on asserted liabilities of the taxpayer for the years 1944 through 1951 and of his wife for 1950 and 1951 were made on January 7, 1954. A notice of deficiency (90-day letter) was mailed on February 11, 1954. On May 10 of the same year, a petition for redetermination of liability was filed with the Tax Court.[1] The Tax Court rendered its decision by judgment on July 31, 1958. Shanadi v. Commissioner, 29 T. C. 1157 (1958). This court affirmed. 266 F. 2d 495 (1959). A petition for a writ of certiorari to the Supreme Court was denied on October 26, 1959. 361 U. S. 874.[2]

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[1] The petition filed on this date concerned tax liability for all years named except 1947. A petition covering 1947 was filed earlier and consolidated with the instant petitions for Tax Court hearing. The difference in dates is of no consequence for purposes of this appeal.

[2] The denial of a petition for writ of certiorari renders the decision of the Tax Court final. 26 U.S.C. §1140(b)(2) (1952 ed.). Thus the statute was tolled, if at all, for the entire period between the filing of the petition for redetermination in the Tax Court and the denial of the petition for writ of certiorari.

From the time of the making of the jeopardy assessments in 1954, considerable efforts were made by the District Director of Internal Revenue to collect on them. When, in 1961, a liability of $67,211.11 remained outstanding, the United States brought suit on June 2 of that year to reduce the liability to judgment. Cross-motions for summary judgment were filed in the case, and judgment was entered for the United States. The defense of the statute of limitations interposed by the taxpayer was rejected by the district court for the reason that the Tax Court proceedings tolled the statute. It must be conceded that if the statute of limitations was suspended, the suit here was timely.

The pertinent section of the Internal Revenue Code of 1939 reads as follows:

> "§277. Suspension of Running of Statute.
>
> "The running of the statute of limitations provided in section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under section 272(a)) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (*and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board* [*Tax Court*], *until the decision of the Tax Court becomes final*), and for sixty days thereafter." (Emphasis ours.)

It is obvious that the statute, on its face, firmly supports the conclusion of the district court by providing that the running of the statute of limitations on suit for collection is suspended during proceedings in the Tax Court *under any circumstances.*

The taxpayer, however, argues that the provision for jeopardy assessments under §273 is an exception to the

general assessment provisions of §272.[3] From this it is argued that §277 does not apply to jeopardy assessments because that section refers only to §272(a). The conclusion simply does not follow from the premise. There is no question that the procedure under §273 (jeopardy assessments) differs from the procedure provided under §272. But §273(b), like §272(a), requires the mailing of a notice of deficiency to the taxpayer. Indeed, the statute specifically provides that the notice following a jeopardy assessment shall be mailed under §272(a). 26 U. S. C. §273(b) (1952

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[3] Sections 272 and 273 in pertinent part read, respectively, as follows:

"Internal Revenue Code of 1939:

"§272. Procedure in General.

"(a)(1) **Petition to the Tax Court of the United States**—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * *" 26 U.S.C. §272 (1952 ed.).

[3] (continued)

"§273. Jeopardy Assessments.

"(a) **Authority for Making.**—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

"(b) **Deficiency Letters.**—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment." 26 U.S.C. §273 (1952 ed.).

ed.). More importantly, the statutory scheme calls for the same chain of events whether a jeopardy assessment has been made or not. In either case, the taxpayer has the opportunity to secure a redetermination of his liability in the Tax Court.

The taxpayer next notes that the Commissioner was not barred from proceeding to collect on the assessment while the matter was before the Tax Court. On the basis of this, it is urged that §277 suspends the running of the statute of limitations only if the Commissioner is so prohibited, or, as he puts it, only as long as "the Commissioner's hands are tied." But the very language of §277 refutes the argument. For the clause suspending the statute during the period the Commissioner is barred from acting is immediately followed by the parenthetical clause "(and in any event, etc.)." Taxpayer's reading of the statute is persuasive only if the parenthetical clause is regarded as a nullity. We are obviously entirely without power to amend statutes of Congress in this or any other fashion.

In support of this latter argument, the taxpayer refers us to the Congressional history of the section. Nothing in the reports or debates, however, would indicate that Congress did not intend what the plain words of the statute mean. The following language, taken from the 1928 House Committee Report, which was made at the time the present parenthetical phrase "(and in any event, etc.)" was proposed to and approved by Congress, H. Rep. No. 2, 70th Cong., 1st Sess., 23-24 (1939-1 Cum. Bull. (Part 2) 384, 399-400); S. Rep. No. 960, 70th Cong., 1st Sess., 31-32 (1939-1 Cum. Bull. (Part 2) 409, 431), is as helpful as anything to which we have been referred:

> "Under existing law and under the provisions of the bill, the running of the limitation period on assessments is suspended while an appeal is pending before the Board. Subsequently the Board may dismiss the appeal on the ground that the petition was not filed within the 60-day period or, for example, because the

paper filed within the period was not sufficient to constitute a petition. The decision dismissing the appeal may not be made until months after the proceeding was begun and there is some question whether in such cases the statute of limitations on assessment is actually suspended during the pendency of the proceeding. It is specifically provided in section 277 that the limitation period shall be suspended, if any proceeding is placed on the docket of the Board, until the decision of the Board in respect thereof becomes final and for 60 days thereafter.

"This provision also takes care of any uncertainty as to the suspension of the statute where, after the decision of the Board, a petition for review is filed without the required bond. It also provides for the situation where a taxpayer files a waiver of the restrictions on the Commissioner as to assessment or collection where the legal sufficiency of the waiver may not be determined for a considerable period of time after it is filed."

A fair reading of this report seems to make it clear that in adding "(and in any event, etc.)" to the statute, it was intended to provide that the statute of limitations be suspended in any and all situations where action is taken by the taxpayer to have deficiencies redetermined by proceedings in the Tax Court.

The conclusion reached on the basis of our analysis of the statute and legislative history has ample support in the decided cases. Estate of Iaconi, April 21, 1961, ¶61,106 P-H Memo T.C.; Bartmer Automatic Self Service Laundry, Inc. v. Commissioner, 35 T.C. 317 (1960). The cases construing §277 have uniformly construed it in the broadest fashion, to stop the running of the statute when matters are being litigated in the Tax Court under *any* circumstances. Green Spring Dairy, Inc. v. Commissioner, 208 F.2d 471, 476-477 (C.A. 4, 1953); American Equitable As-

surance Co. of New York v. Commissioner, 68 F.2d 46 (C.A. 2, 1933); Mutual Lumber Co. v. Poe, 66 F.2d 904 (C.A. 9, 1933); United States v. Shepard's Estate, 196 F. Supp. 281 (N.D.N.Y., 1961).

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT.

This matter coming on for hearing before this Court on November 14, 1963, and the parties appearing through their respective counsel; and counsel being unable to agree completely upon the form of judgment to be entered;

It is hereby ORDERED, ADJUDGED and DECREED that the United States of America recover of the defendant, Albert N. Shahadi, the sum of $107,946.08, which sum is made up of $65,298.05 tax assessment for the years 1945, 1946, 1947, 1948 and 1949, together with lien charges and interest calculated up to and including March 6, 1964;

It is further ORDERED, ADJUDGED and DECREED that interest shall run at the rate of six per cent on the unpaid balance of the tax of $65,298.05 until the same is paid, or, at the same rate, upon any unpaid balance thereof.

It is further ORDERED that this judgment be entered without costs.

March 6, 1964.

THOMAS M. MADDEN,
Chief Judge.

SUPPLEMENTAL ORDER.

This matter having come on for hearing on October 11, 1963, and for further hearing on November 14, 1963, and the plaintiff, United States of America, having moved for summary judgment against the defendants, Albert N. Shahadi and Josephine Shahadi, and the defendant, Albert N. Shahadi, having moved for summary judgment against the plaintiff, United States of America, it is determined by the Court as follows:

It is the judgment of this Court that the Statute of Limitations was suspended during the time that this matter was before the Tax Court, and on appeal therefrom before the United States Court of Appeals in and for the Third Circuit, and while certiorari was pending therefrom before the United States Supreme Court.

It is the further judgment of this Court that the lien, the assessment, and the amount due thereon are controlled by the doctrine of res judicata. This is based upon the fact that the same matter was heard by the United States Tax Court and the Tax Court made a determination therein and found the amount due, that this determination was appealed to the United States Courts of Appeals in and for the Third Circuit, and that this Court has no authority under these circumstances to make inquiry into the validity of the lien or the amount due thereon.

It is the further judgment of this Court that the defendant, Albert N. Shahadi, and the defendant, Josephine Shahadi, are validly married and that the property on South Delancey Street in Atlantic City is held by them as husband and wife as tenants by the entirety, and that the lien is solely against the defendant, Albert N. Shahadi, it being stipulated by the parties hereto that the wife, Josephine, is not indebted to the Government up to the current

year and that therefore there is no lien of the Government that attaches to her interest in the property.

It is the further judgment of this Court that the application on the part of the plaintiff, United States of America, for marshalling of assets and the sale of the South Delancey Street property be and the same is denied.

It is the further judgment of this Court that the plaintiff, United States of America, will have judgment against the defendant, Albert N. Shahadi, in accordance with the Order entered March 6th, 1964.

It is the further judgment of this Court that the motion by the defendant, Albert N. Shahadi, for summary judgment is dismissed and the motion by the plaintiff, United States of America, for summary judgment is granted as hereinbefore set forth.

It is the further order of the Court that the oral statements made by the Court at the conclusion of the hearings on October 11, 1963, and November 14, 1963, are annexed hereto and made a part of the record in this matter.

Dated: March 10, 1964.

THOMAS M. MADDEN,
Chief Judge.